No. 8[redacted]57

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ALBERTO VARGAS,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Scheffer Printing Company, Del. 7171

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To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Alberto Vargas, the plaintiff-appellee below, respectfully prays that a writ of certiorari be issued out of this Honorable Court to review the judgment (R. 812) of the Circuit Court of Appeals for the Seventh Circuit entered February 27, 1948, reversing the order of the United States District Court for the Northern District of Illinois, Eastern Division, setting aside a contract between petitioner and Esquire, Inc., and remanding the case with instructions to dismiss the complaint.

Opinions below.

The opinion of the Trial Court is unreported. It appears at pages 775-783 of the record.

The opinion of the Circuit Court of Appeals (R. 798-811) is reported in 166 Fed. (2d) 651.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered February 27, 1948. Petition for rehearing was timely filed on March 12, 1948. It was denied on April 6, 1948. The jurisdiction of the court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 26 Stat. 828, Ch. 517, Sec. 6, as amended, 36 Stat. 1157, Ch. 231, Sec. 240, 43 Stat. 938, Ch. 229, Sec. 1, Title 28 U. S. C. A. Sec. 347. This petition is timely filed in accordance with 26 Stat. 828, as amended, Title 28 U. S. C. A. Sec. 350.

QUESTIONS PRESENTED.

I.

(1) Whether a Circuit Court of Appeals, in reversing a case tried by the court without a jury where the evidence is almost wholly oral and adduced from witnesses in open court, is precluded by Rule 52 (a) of the Rules of Civil Procedure from ignoring voluminous and detailed findings of fact of the trial court, and from hearing the case as if *de novo* and making its own statement of facts as the basis of its decision.

(2) Whether this court will exercise its power of supervision over a Circuit Court of Appeals and correct its judgment reversing the trial court, in a case where it appears that the judgment is arrived at through improper and capricious violation of Rule 52 (a) of the Rules of Civil Procedure.

(3) Whether this court will exercise its power of supervision over the Circuit Court of Appeals where such court, on review of but one issue in a declaratory judgment action of which the lower court has taken jurisdiction but which has not been completely tried, has, on reversing the trial court's order setting aside a certain contract in question, peremptorily and of its own motion remanded the case with directions to dismiss the complaint instead of instructing the trial court to proceed with the declaration of the rights of the parties in conformity with the opinion of the court.

Specification of Errors Relied upon.

We respectfully submit that the court below erred:

1. In failing to affirm the decision of the trial court.
2. In ignoring the findings of fact of the trial court.
3. In not finding the findings of fact of the trial court were not clearly erroneous.
4. In not holding that the findings of fact of the trial court supported the conclusion of law that a relationship of especial trust and confidence existed between plaintiff and David A. Smart.
5. In remanding the cause to the trial court with directions to dismiss the complaint.

STATEMENT.

Plaintiff, a citizen of Illinois, on February 11, 1946, filed a declaratory judgment action against defendant, Esquire, Inc., a Delaware corporation, asking that the court inquire into and declare the rights of the parties under a situation which had arisen as regards a certain contract between the parties dated January 1, 1944. Mr. Vargas, the plaintiff, was 48 years old at that time.

This contract bound plaintiff, an artist, to furnish his pictures to defendant exclusively for a period of 10½ years and to furnish pictures for no other publication for three years thereafter; to give up the use of his name "Varga" at the end of his contract; to furnish a picture a week, thus in effect doubling the amount of work he had previously been doing for Esquire, Inc., and his pay, from all known information, was to be less than he had received in the last previous year of employment. The evidence is undisputed that it ordinarily took plaintiff from ten days to two weeks to complete a picture. The plaintiff, under this contract down to January 1, 1946, furnished the drawings reproduced as the "Varga Girl" in defendant's publications. Early in January 1946 he advised the defendant that he was not bound by said contract and would no longer perform under it. He furnished no further pictures to defendant.

Plaintiff in his complaint alleged that the contract in question had been obtained by defendant through the breach of a relationship of trust and confidence fostered and built up in plaintiff by defendant through its President, David A. Smart. Plaintiff further contended that

by reason of the said breach of this confidential relationship he had been induced to sign said contract without knowing its contents; that said contract, as to him, was unfair and inequitable and that he had refused longer to perform thereunder.

He asked that the court inquire into and declare the rights of the parties in relation to said contract and upon said inquiry that it find and declare the same null and void; that defendant be decreed to pay to him sums due for pictures delivered; that an accounting be had between the parties and that defendant be enjoined from interfering with the employment of plaintiff by others.

The defendant contended no relationship of trust and confidence existed; that the contract was fairly entered into, was valid and should be so held. In its counterclaims it asked the court to enforce the negative covenants of said contract by enjoining plaintiff from furnishing pictures for others and for a money judgment for a debt alleged to be due from plaintiff to defendant.

The court determined that the matter of the validity of the contract should be tried first. On a motion of defendant to limit the issues to be tried by the jury it decided that the issue of the validity of the contract would be tried by the court without a jury (R. 39). It heard the evidence on this issue of the case and at the conclusion thereof rendered its oral opinion (R. 765); made findings of fact (R. 775) and made conclusions of law (R. 784).

The court on the basis of its findings of fact, concluded a relationship of especial trust and confidence did exist between plaintiff and David A. Smart, and that said David A. Smart violated said relationship at the time of entering into said contract in that he had not dealt fairly with

plaintiff. It further found that said David A. Smart at the time said contract was entered into, for the purpose of inducing plaintiff to sign the same, misrepresented to plaintiff matters of a material nature concerning said contract and that plaintiff, relying thereon, signed the contract, not knowing or understanding its contents. The contract was found to be unfair and inequitable as regards plaintiff. The court ordered it set aside (R. 774). Defendant appealed. The court deferred hearing the balance of the case pending such appeal.

The Circuit Court of Appeals by a divided court reversed the order of the trial court and remanded the case to that court with directions to dismiss the complaint (R. 812). A petition for rehearing was filed and denied. The majority of the court were of the opinion plaintiff had not established a relationship of trust and confidence by the proof required by the applicable law, and that the contract could not be avoided on the ground of fraud. It stated the decree of the lower court is without evidence to support it.

A dissenting opinion was filed by Judge Major. He stated that the majority of the court in violation of Rule 52 (a) of the Rules of Civil Procedure had entirely disregarded the findings of fact of the trial court; that it had improperly proceeded to hear the case *de novo* on the record and made its conclusions in complete disregard of the findings of fact of the trial court; that the findings of the trial court were completely proved; that no more complete case establishing fiduciary relationship could have been presented by plaintiff.

A petition for rehearing was timely filed and a reply filed thereto. This petition was denied.

REASONS RELIED UPON FOR ISSUANCE OF THE WRIT.

I.

The Circuit Court of Appeals Has Decided a Question of Importance under Rule 52 (a) of the Federal Rules of Civil Procedure in a Manner in Conflict with the Decision of This Court in United States v. United States Gypsum Co., 68 S. Ct. 525; 92 L. Ed. 556, and in Conflict with the Decisions of the Other Circuit Courts of Appeals.

The cardinal fact to be established in this case by the plaintiff was that a relationship of especial trust and confidence existed between the plaintiff and David A. Smart, defendant's chief executive officer. If such a relationship was established the burden was then cast on the defendant to prove the contract in question was fairly entered into on defendant's part.

Much of the testimony at the trial was aimed at establishing such a relationship on plaintiff's part and at refuting its existence on the part of defendant. This evidence is almost wholly oral and was adduced from witnesses on the witness stand. The taking of the oral testimony covered over seven full days in court and is transcribed in 550 pages of the printed record. The court heard and saw Mr. Vargas and Mr. David A. Smart, throughout the giving of their extended testimony.

The trial court delivered its opinion and decision (R. 765), stating clearly its views of the facts and the law applicable to the case. More important, it supported that opinion and its decision with extensive findings of fact. Many of these findings are detailed and pertain solely

to the evidence adduced before the court which tended to support the relationship of trust and confidence found by it.

The substance of the specific findings by the trial court on this score were:

1. Plaintiff, a Peruvian, was an artist. David A. Smart was the active head of defendant corporation and a man of wide and successful business experience. (Findings 6, 8, R. 776.)

2. Mr. Smart was the agent of defendant with whom plaintiff dealt in matters concerning his employment and compensation. (Finding 8, R. 776.)

3. From the time of the arrival of Mr. and Mrs. Vargas in Chicago Mr. Smart took an unusual interest in everything pertaining to their lives. (Finding 16, R. 778.)

4. He was always consulted about their places of abode, visited apartments they desired to rent and was consulted by them and advised them concerning the furnishing of their apartments. (Finding 17, R. 778.)

5. For 2½ years after July, 1940 he was a frequent visitor at their apartment. (Finding 18, R. 778.)

6. Soon after July 1, 1940 he advised plaintiff and his wife to go to the financial department of defendant to get any money needed by them for furnishing their apartment or for other purposes. (Finding 19, R. 778.)

7. Down to January 1, 1943 plaintiff received from defendant $3,419.229 in excess of his earnings under his then existing contract which defendant discharged without advising plaintiff of this act and without demanding repayment from him. (Findings 13, 21, 22, R. 777, 778.)

8. For the year 1943 plaintiff received from defendant $10,573.12 in advances and at the year's end $5,699.80

in excess of the amounts which plaintiff would have earned under his previous contract was discharged without notice or advice to the plaintiff of its act and without demanding repayment from him. (Findings 14, 21, 22, R. 777, 778.)

9. Plaintiff received from defendant among other things advances of $5,000.00 to bring his mother and sister from Peru to Chicago; $2,250.00 to buy a ring for his wife; $728.00 to buy a coat for his wife, as well as substantial sums to buy furnishings. (Finding 20, R. 778.)

10. After May 15, 1941, no accounting was ever made or had, nor repayment asked of any sum advanced to plaintiff by defendant. (Findings 21, 22, R. 778.)

11. Mr. Smart had complete control of plaintiff's work done for others, and plaintiff for his earnings from said work necessarily depended on the judgment of Mr. Smart. (Finding 24, R. 779.)

12. Mr. Smart had close personal supervision of plaintiff's work for defendant and guided and encouraged him in his work. (Finding 26, R. 779.)

13. During the year 1943 David A. Smart told plaintiff he would give him a new contract substantially better than he would have, had defendant exercised its option to extend his first contract. (Finding 25, R. 779.)

14. By his acts David A. Smart became and was the friend and adviser of plaintiff as regards his business and domestic affairs and invited and had the special trust and confidence of plaintiff far beyond the trust and confidence ordinarily existing between men associated in business as "employer and employee." (Finding 23, R. 779.)

15. Plaintiff at the time of signing the contract in question did not act as a free agent. ((Finding 38, R. 781.)

Each and every of these findings is supported by the evidence. Indeed the only one criticized by counsel for defendant in its brief was numbered 14 above. Of this they contended the evidence did not support so broad a finding.

That this court may by contrast have before it facts found by the Circuit Court of Appeals we quote from its opinion. Without in any way noticing the above findings of the trial court it stated concerning the relationship of especial trust and confidence (R. 800):

"Briefly the controlling facts shown from all the evidence were that Vargas was an artist in whom Smart was interested; that as a friend he advised Vargas and his wife (a native born American who handled his business affairs) as to their place of abode and the furnishing of their apartment; that Smart visited Vargas' home and had defendant advance such money as they might need to furnish their apartment and which they might from time to time require for various purposes; that Vargas believed in the honesty of Smart; that Vargas was given attention and supervision so as to make sure that his pictures were the best to be obtained from him; that efforts were made to see that he might work and live in agreeable and pleasant surroundings which would help him to work and enhance his prestige as an artist; and that Smart did what he reasonably could to satisfy the wants and desires dictated by Vargas' artistic temperament."

The difference between this statement of the facts and the findings of the trial court is sharply apparent. The court has in effect set aside every finding of fact of the trial court. And it has done this without mentioning even one finding or pointing out its infirmity, if any, as shown by the record.

The findings of fact of the trial court under the Illinois cases can lead to no other conclusion than that a relationship of trust and confidence existed. In *Commercial Bank* v. *Kloth,* 360 Ill. 294; *Seely* v. *Rowe,* 370 Ill. 336; and *Thomas* v. *Whitney,* 186 Ill. 225, it is stated that a confidential relationship exists where the *facts* reveal that trust is confided in one and accepted by him. In *Thomas* v. *Whitney,* 186 Ill. 225, the court states concerning the rule: "The only question is, does such a relation *in fact* exist." If the trial court's findings be accepted the relationship undoubtedly existed in fact.

Under the Illinois law the question whether this relationship exists is undoubtedly one of *fact solely,* not a question of law nor a mixed question of law and fact. The lower court found as a finding of fact it existed.

It was these findings and the inevitable conclusion drawn therefrom which came to the Circuit Court of Appeals for review. As an appellate tribunal in its review it is bound by and must follow Rule 52 (a) of the Rules of Civil Procedure. It was bound by the findings of the trial court unless they are clearly erroneous. It must further in considering the case give due regard to the opportunity of the trial court to see the witnesses and judge of their credibility.

This does not deny the right of review. The reviewing court's function is limited to what the courts through long experience have found just. The reviewing court may not do what was done here. It may not search the record as if trying the case *de novo,* reach a conclusion different from the trial court and conform its statements of facts accordingly, ignoring the findings of the fact of the trial court. In doing this it has violated the basic principles of review. It has interpreted and applied Rule 52 (a)

in this case in a way in conflict with the decisions of this Honorable Court and with the decisions of the other Circuit Courts of Appeals.

This court has lately passed upon the interpretation of Rule 52 (a) in the case of *United States* v. *U. S. Gypsum Co.*, 68 S. Ct. 525; 92 L. Ed. 556. Here the court stated, (92 L. Ed. Pg. 568), it was the intention of this rule to make applicable the prevailing equity practice and that the appellate court might reverse the findings of fact if "clearly erroneous"; that the findings of the trial court when dependent upon oral testimony, where candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The court observed that the findings were never conclusive, and that a finding was clearly erroneous, when, although there was evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

This statement of the rule is that contended for by the petitioner. It bound the appellate court to accept the findings of the lower court unless they were found vulnerable under the test laid down by this court. The rule in its application to the instant case is in no wise varied by the action of this court in the *Gypsum Company* case in setting aside certain findings of the lower court. There the findings based partly on oral testimony in response to leading questions were set aside as at variance with contemporaneous written documents and admitted facts. This the court had a right to do. The definite and firm conviction of a mistake having been made rested upon evidence pointed out by the court and was justified. The setting aside of the findings was only done after the finding was noted and the error pointed out.

The court in that case assuredly does not sanction by word or act what was done by the reviewing court in the instant case. It does not say or intimate that a reviewing court, in a case where the testimony is largely oral, without noticing findings of fact, may reverse a lower court because on the review of the whole record it does not agree with its judgment.

In each circuit the Circuit Courts of Appeals have recognized (1) They may not inquire to ascertain other than whether a finding is clearly erroneous; (2) They may not set aside a finding of fact merely because the reviewing court would have found differently in the record; (3) They may not try the case *de novo*: *Manning* v. *Gagne,* 108 Fed. (2d) 718, (1st Circuit); *Corbett* v. *Halliwell,* 123 Fed. (2d) 331, (2nd Circuit); *Katz Underwear Co.* v. *U. S.,* 127 Fed. (2nd) 965, (3rd) circuit); *Guilford Construction Co.* v. *Biggs,* 102 Fed. (2d) 46, (4th Circuit); *Sundt* v. *Turman Oil Co.,* 107 Fed. (2d) 762, (5th Circuit); *Andrew Jergens Co.* v. *Conner,* 125 Fed. (2d) 686, (6th Circuit); *Storby* v. *Armour & Co.,* 107 Fed. (2d) 499, (8th Circuit); *Occidental Life Insurance Co.* v. *Thomas,* 107 Fed. (2d) 876, (9th Circuit).

The courts unanimously recognize the salutary purpose of the limitations of this rule on their review of the findings of fact and strive to observe them. It is of utmost importance that the rule be maintained and not disregarded as in the instant case. The action of the Circuit Court of Appeals in this case if permitted to stand would sanction an entire reversal of the principles governing review. It would become a rule of whim and caprice rather than one guided by the rules found just and established for the reviewing courts. The action of the Circuit Court of Appeals in this case calls for a review by this Honorable Court.

Except for the lip service rendered to the rule by the court at the close of its opinion, it might be said the court had entirely disregarded the rule. Here the court said (Rec. 805) it was not unmindful of the fact that the trial judge heard and saw the witnesses and that his decree should not be disturbed unless clearly erroneous, but that nevertheless they thought the decree was without evidence to support it and should be reversed. This does not in any sense correct the court's error. Its whole opinion shows unmistakably an application of the rule as pointed out above herein. The fact that its action is a declared application of the rule renders only more important a review by this court.

II.

In Its Improper and Capricious Contravention of Rule 52 (a) of the Rules of Civil Procedure the Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as to Require the Exercise of This Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

We have stated heretofore the salient terms of the contract as regards plaintiff. It may well be an onerous contract to him and involves the probable remainder of his useful life. It is personal and if unsatisfactory may amount to virtual slavery for a long period of time. It assuredly would keep him at a continuous and arduous task for 10½ years. A contract taking so much of a human life, should command rapt attention from a court. There would have to be strong reasons to impel any person to enter into such a contract. Indeed, it seemed of such a nature that, the trial court found (Finding 46, R. 781), that if plaintiff had known and understood its terms and the truth of the matters misrepresented to him and withheld from him, he undoubtedly would not have signed it.

Plaintiff contends he signed it only because of the existence of a relationship of trust and confidence between him and David A. Smart and the breach thereof by Mr. Smart. The establishing of the relationship of trust and confidence as contended for by plaintiff would have had the sole result of casting the burden of proving fairness in securing the contract on the defendant. As we said, the very terms of the contract demand fairness in securing it and the burden of fair dealing sought to be cast on defendant is one a just employer would gladly assume. Defendant, however, strenuously denies any relationship of trust and confidence and most strenuously insists all dealings were at arm's length. It in effect confesses a want of fair dealing and insists upon its right to overreach the plaintiff.

The court, we submit, should in such a case carefully balance the scales of justice. A court of equity should look impartially and with the utmost judiciousness at a complaint involving the fairness of such a contract. A court of review should use care to be guided in its decision by the rules laid down for its observance.

This the majority of the Circuit Court of Appeals did not do. That it contravened Rule 52 (a) of the Rules of Civil Procedure cannot, we submit, be questioned.

We insist this was an improper and capricious disregard of the rule. The court knew well this rule and its limitations. The majority had sat on several cases where Rule 52 (a) was correctly laid down and applied. In few cases before the Circuit Courts of Appeals are there as vigorous and pointed a dissent as that of Judge Major here. This dissent pointed out not only the error of procedure and of law, but gave the evidence supporting the findings of fact of the trial court. In the face of its atten-

tion being thus directed to its error the majority persisted in its action.

It has been stated that this court will exercise its power of supervision only when the respect for the federal courts is endangered. We submit such a situation exists here. It can be little solace to Mr. Vargas serving under this inequitable contract that, as stated by Judge Major in his dissenting opinion, his was the case of all cases wherein the reviewing court has most completely disregarded the findings of fact of the trial court; that his is the case wherein the reviewing court has wrongfully tried the case *de novo;* that his is the case wherein, in spite of the fact that to attempt to present a more complete record establishing a relationship of trust and confidence would be futile, it was held no such relationship was established.

On this record the majority of the court has taken from plaintiff his freedom of action for a long period of time, not merely as its whim might direct, but by what we contend is a capricious action in disregard of its duty. The respect for the court must, we feel, inevitably suffer from such acts.

The procedure on review as regards the findings of fact is clear. It was the duty of the court to test these findings by the rule to determine if they were clearly erroneous. In each instance, it was to determine whether as to a finding, it had a definite and firm conviction it was wrong. Tested by this rule every single finding of the trial court must stand. It must be found for example that Mr. Smart took an unusual interest in everything pertaining to the lives of the Vargas; that he advised and consulted with them concerning the places of abode and was consulted about and advised concerning their furnishings; that money was advanced at his direction in inordinate sums

without any accounting or demand for repayment, etc. It is so throughout the whole of the findings enumerated above herein. If these findings are so tested and stand, the conclusion that a relationship of especial trust and confidence *in fact* existed must be reached.

Its duty to follow Rule 52 (a) was pointed out and known to the majority of the court. The only notice taken of Rule 52 (a) by the majority of the court, however, was the remark in their opinion to the effect that, although they were not unmindful of the trial court's function, the decree was without evidence to support it.

This statement merely emphasizes the error of the court. It clearly shows they had reached a different conclusion than the trial court on a search of the entire record, regardless of its findings of fact, and were reversing the case for that reason.

It may be insisted that the reviewing court had a definite and firm conviction the findings were wrong. If, when each finding is tested by the rule of procedure it is found not clearly erroneous, then a definite and firm conviction that they were wrong cannot exist. Otherwise the reason for that conviction could be pointed out in the evidence as was done by this court in the *Gypsum Co.* case.

In this matter the trial court heard and saw the witnesses. What its conviction was, as gathered from its hearing and seeing of the witnesses, is in its findings of fact, conclusions of law and decision. It is recognized that no appeals court can place itself in this same position and gain the feel of the case since this no appellate printed record can impart. This is one important reason for the rule in question limiting their action on review.

The plaintiff, we submit, had a right to have his case reviewed in accordance with the rules of Civil Procedure.

He had a right to expect that the Circuit Court of Appeals would be guided by known precepts and would not improperly depart from the path clearly marked for it. When the majority of that court, however, in the face of a protest by another judge, insist on pursuing a course clearly in error and prejudicial to plaintiff, this court should interfere and correct it.

III.

In Peremptorily and Arbitrarily Remanding This Case to the Lower Court with Directions to Dismiss the Complaint, the Circuit Court of Appeals Has So Far Departed from the Accepted and Usual Course of Judicial Procedure as Applied to Declaratory Judgment Actions as to Require the Court's Exercise of Its Power of Supervision to Prevent a Gross Miscarriage of Justice.

The trial court at the conclusion of its hearing on the validity of the contract between the parties, entered the order appealed from. It asserted it would then go ahead and try the rest of the law suit (Tr. 774). Since its further action, however, was largely governed by the final decision on the validity of the contract, it has continued the cause before it pending determination of the appeal.

The Circuit Court of Appeals (R. 798) asserts this was an action to cancel and set aside the contract. This, we submit, is erroneous. This was not a mere action for cancellation of the contract. It was a declaratory judgment action bringing before the court the whole situation arising in relation to the contract between the parties. The complaint sets up (R. 12) that plaintiff had advised defendant he would deliver to it no more pictures; that it was necessary that he work for others and that defendant had threatened to keep him from so working. The plaintiff stated he would be unable to work for others until the

rights of the parties had been determined by the court. The prayer of the complaint (R. 13) is that the court examine into and declare the rights of the parties in relation to the contract in question and in connection with such declaration that it find and decree the contract to be null and void.

It further prayed that defendant pay plaintiff for certain pictures and for an accounting; it asked that defendant be enjoined from interfering with and in any way preventing plaintiff's employment by others. It concludes with a prayer for general relief.

Defendant answered admitting it would attempt to keep plaintiff from working for others and that it might be impossible for plaintiff to get work until the rights of the parties were determined by the court (R. 26).

While it was plaintiff's contention that the contract was null and void, the complaint contemplated that the court might not so find. The respective rights of the parties still remain to be determined in the event the contract be sustained. We feel confident the court will not by mandatory order compel plaintiff to make and deliver pictures to defendant. The contract contains negative covenants against plaintiff working for others. There is to our mind a grave question as to the validity of these negative covenants in the contract. There is the further question as to whether the negative covenants in the contract will be enforced to any degree. As set up in the complaint, plaintiff in order to work for others asks the court to define his rights at this time rather than having a contest between the parties after he has begun so to work. As pointed out in the complaint (Tr. 12), one using his drawings will have to invest a large sum before any product can be published to bring about such a contest. To settle the rights

of the parties without jeopardizing that sum was the object of this suit and such is the fundamental concept of the declaratory judgment act.

The court has a discretion in exercising its judgment as to whether to entertain a declaratory judgment action. It may, however, not abuse that discretion. In this cause where the trial court received and entertained the action it was, we submit, for it to say whether it would continue to entertain it and proceed in the matter. For the Circuit Court of Appeals peremptorily, and without a clear conception of the facts, to order the complaint dismissed is an arbitrary and unwarranted exercise of its authority.

This action is not in harmony with the declaratory judgment act or the decided cases arising thereunder, *Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227; *Brillhart* v. *Excess Insurance Co. of America,* 316 U. S. 491. The court has, however, made no decision concerning that act. It has in fact given no reason for its action in so remanding the case. This action alone in view of the trial court's action was error.

The petitioner presented a justiciable controversy under the declaratory judgment act to the court for decision. That controversy was present whether the court found the contract valid or invalid. The lower court had assumed jurisdiction and was holding the case to fully define the rights of the parties.

The lower court has been reversed as to its decision on the single point of the validity of the contract. It should be permitted to determine the other questions upon the basis of its validity. Not to permit it to do so in effect nullifies the declaratory judgment act. Upon this state of the record the Circuit Court of Appeals by its direction to dismiss arbitrarily and without assigning any reason

takes from the court the jurisdiction it has assumed. This was done without the matter being brought before it as a matter of review and without it being raised by motion or otherwise. For it thus of its own motion to dismiss plaintiff's further action before the lower court is an unjustifiable abuse of its authority. The court should interfere to prevent such action becoming a guide for future action in disparagement of the declaratory judgment act.

CONCLUSION.

It is respectfully submitted that the writ of certiorari requested herein should be granted.

Respectfully submitted,

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